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Supreme Court, U.S.
FILED

071180 MAR 17 2008

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DEFENDERS OF WILDLIFE AND SIERRA CLUB,

Petitioners,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY

Respondent.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. § 1103 note, provides that "the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the" physical barriers and associated roads along the United States' border that are authorized by that provision. The statute expressly precludes actions seeking judicial review of a waiver for failure to comply with the statutory standard and permits only suits alleging constitutional violations. This action presents a constitutional challenge to the Secretary's decision waiving nineteen federal laws, and all state and local legal requirements related to them, in connection with the construction of a barrier along a portion of the border with Mexico.

The questions presented are:

1. Whether the preclusion of judicial review renders Section 102(c)'s grant of expansive waiver authority to the Secretary of Homeland Security an unconstitutional delegation of legislative power.

2. Whether Section 102(c)'s grant of waiver authority violates Article I's requirement that a duly-enacted law may be repealed only by legislation approved by both Houses of Congress and presented to the President.

RULE 29.6 STATEMENT

Defenders of Wildlife and Sierra Club state that neither organization has a parent corporation and no publicly-held corporation owns 10% or more of the stock of either organization.

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-20a) is reported at 527 F. Supp. 2d 119.

JURISDICTION

The judgment of the district court was entered on December 18, 2007. This Court's jurisdiction rests on Section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note.

STATUTORY PROVISION INVOLVED

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note, provides in relevant part:

> (a) The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.
>
> * * * *
>
> (c)(1) Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.
>
> * * * *

(2)(A) The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

* * * *

(C) An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

STATEMENT

Section 102 of IIRIRA delegates extraordinarily broad authority to the Secretary of Homeland Security. He may waive any statute or legal requirement—federal, state, or local—that otherwise would apply to the actions of the government, or of anyone else, in constructing the border fence if in the Secretary's "sole discretion" he finds such a waiver "necessary to ensure expeditious construction." And there is no judicial review to determine whether the Secretary's waiver decision accords with the statutory standard.

This constitutional challenge to this statute delegating unprecedented power presents important questions regarding fundamental separation of powers principles. "Liberty is always as stake when one or more of the branches seek to transgress the separation of powers * * *. By increasing * * * power * * * beyond what the Framers envisioned, [a] statute

compromise[s] the political liberty of our citizens, liberty which the separation of powers seeks to secure." *Clinton* v. *City of New York*, 524 U.S. 417, 450, 452 (Kennedy, J., concurring).

Section 102 violates the separation of powers in two ways. First, a delegation of authority can satisfy the "intelligible principle" standard only if the Executive's actions are subject to judicial review to ensure that they comport with the standard established by Congress. Indeed, the entire purpose of the requirement of a statutory principle is to be able "in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus* v. *United States*, 321 U.S. 414, 426 (1944). The absence of judicial review here is therefore fatal to Section 102 under the nondelegation doctrine.

Second, as in *Clinton*, the delegation of authority here bypasses the Constitution's process for amending or repealing a law and instead endows the Secretary of Homeland Security with authority to void any federal law, free of any review of his determinations. That effectively gives the Secretary legislative power equivalent to that exercised by Congress and therefore is invalid under *Clinton*.

This Court's intervention is necessary because of another unique aspect of this statute: Congress eliminated all appeals as of right in constitutional challenges to Section 102. Congress's decision to bypass the courts of appeals means this Court is the only forum that can reconcile the contradictory legal principles applied by the district court here and by the courts of appeals in other cases holding that the availability of judicial review is essential to satisfy the "intelligible principle" standard. Review by this Court is therefore plainly warranted.

A. Statutory Background

Congress in 1996 directed the Attorney General to "install additional physical barriers and roads * * * in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, tit. I, § 102, 110 Stat. 3009, 3009-554 (codified as amended at 8 U.S.C. § 1103 note). The first such barrier was to be constructed "along the 14 miles of the international land border of the United States, starting at the Pacific Ocean and extending eastward" in the vicinity of San Diego. *Id.* § 102(b)(1).

The statute authorized the Attorney General to waive the provisions of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, to the extent "necessary to ensure expeditious construction of the barriers and roads" at the border. 8 U.S.C. § 1103 note. The Attorney General never exercised this authority during construction of the San Diego border fence; indeed, the Bureau of Customs and Border Protection ("CBP") undertook to comply with NEPA and ESA.[1]

Congress in 2005 amended Section 102 of IIRIRA to grant to the Secretary of Homeland Security[2] au-

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[1] Cal. Coastal Comm'n, W13a Staff Report and Recommendation on Consistency Determination 14 (CD-063-03) (Oct. 2003); Blas Nuñez-Neto & Michael John Garcia, *Border Security: Barriers Along the U.S. International Border* 6 (Cong. Research Serv. Jan. 8, 2008).

[2] A series of amendments, including the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, transferred many

thority to waive "***all*** legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 102, 119 Stat. 231, 306 (emphasis added). The provision also precluded all judicial review of any claim that a waiver under Section 102 exceeded the scope of the Secretary's delegated authority. It permitted the district courts to hear constitutional challenges, but eliminated appeals as of right to the courts of appeals, providing only for certiorari review by this Court of the district court's resolution of constitutional challenges. *Id.* § 102(c)(2).

B. Administrative Actions And Proceedings Below

The Army Corps of Engineers began construction in September 2007 of a border fence in the San Pedro Riparian National Conservation Area ("SPRNCA"), acting under instructions from the Department of Homeland Security. App., *infra*, 2a. The SPRNCA region is one of the most biologically diverse areas of the United States, containing more than 100 species of breeding birds and an additional 250 species of migrant and wintering birds.The National Audubon Society recognized the San Pedro area as its first "Globally Important Bird Area" and the United Nations World Heritage Program designated the area a "world heritage natural area." *See,* UNITED STATES BUREAU OF LAND MANAGEMENT, SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA, DESCRIPTION http://www.blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca.html.

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of the Attorney General's functions under IIRIRA to the Secretary of Homeland Security.

The Department of Homeland Security sought from the Bureau of Land Management ("BLM") a perpetual right of way for the San Pedro border fence. Under the NEPA, BLM is obligated to conduct an initial environmental assessment before granting a right of way and then undertake a further and more detailed environmental impact statement ("EIS") if the agency's proposed action may result in significant environmental impacts. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501. Despite the fact that its environmental assessment disclosed the possibility of serious impacts to the soils and natural resources of the SPRNCA, BLM decided not to prepare an EIS and granted the right of way allowing construction of the fence along most of the SPRNCA's southern border. App., *infra*, at 2a.

After the Department of the Interior failed to act on petitioners' request for an administrative stay of the fence construction, petitioners filed this action in the District Court for the District of Columbia under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, challenging the BLM's failure to comply with NEPA. They also argued that the grant of the right of way violated the Arizona-Idaho Conservation Act of 1988, 16 U.S.C. § 460xx-1, which requires the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" and to "only allow such uses of the conservation area" that further the purposes for which it was established.

Finding that petitioners had demonstrated a substantial likelihood of success on their claims of statutory violations, the District Court for the District of Columbia granted petitioners' motion for a tempo-

rary restraining order barring construction of the fence. App., *infra*, 3a.

Two weeks after the issuance of the temporary restraining order, the Secretary invoked his authority under Section 102(c) of IIRIRA to waive "all federal, state, or other laws, regulations and legal requirements of, deriving from, or related to the subject of" NEPA, the Arizona-Idaho Conservation Act, and seventeen other laws, including the entirety of the APA.[3] He asserted that the waiver of these laws in the SPRNCA was "necessary * * * to ensure the expeditious construction of the barriers and roads," but provided no explanation of the reasons for that determination. 72 Fed. Reg. 60,870 (Oct. 26, 2007).

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[3] The other laws are: the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C. § 1251 *et seq.*; the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Noise Control Act, 42 U.S.C. § 4901 *et seq.*; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*; the Antiquities Act, 16 U.S.C. § 431 *et seq.*; the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*; the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*; and the Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*

Following issuance of the waiver, the district court vacated the temporary restraining order. Petitioners then amended their complaint, asserting that the waiver was invalid because Section 102's grant of waiver authority violated separation of powers principles. App., *infra*, 6a.

The district court dismissed the action, holding that the grant of waiver authority did not violate the separation of powers. App., *infra*. 1a-20a. It first rejected petitioners' argument that the waiver provision is invalid on grounds similar to the Line Item Veto Act held unconstitutional in *Clinton* v. *City of New York*. The court held that "the waiver provision at issue here is not equivalent to the power to amend or repeal duly enacted laws. And therefore the holding of *Clinton* is inapplicable." *Id.* at 12a.

Next, the court considered petitioners' argument that the waiver authority "is an unconstitutional delegation of legislative authority to the Executive Branch." *Id.* at 13a. Notwithstanding the "unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power," and the absence of any opportunity for a judicial determination whether the Secretary's actions complied with the statutory standard, the court concluded that the delegation is permissible because "the Legislative Branch has laid down an intelligible principle to guide the Executive Branch * * *." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

The extraordinarily broad delegation of authority at issue here violates the Constitution's separation of powers principles in two distinct ways. First, this Court's decisions upholding broad delegations of authority against constitutional challenge consistently point to the assurance—provided by the availability of judicial review of administrative action—that the administrative agency would comply with the statutory standard prescribed by Congress for exercise of that authority. There is no such assurance here. Rather, Congress has expressly precluded such judicial review. This Court has ***never*** upheld a broad delegation in the absence of judicial review; neither has any court of appeals.

This serious flaw is magnified further by Section 102's serious intrusion on federalism interests. The district court's decision leaves the Secretary with power to waive state and local laws, as he has in this case (see page 7, *supra*). The breadth of that preemptive authority—unconstrained by any judicial review—confirms the legislative character of the extraordinarily broad power conferred on the Secretary.

Second, the delegation of authority here suffers from the same defect as the line item veto invalidated in *Clinton*—it impermissibly bypasses the constitutionally-mandated procedure for enacting, amending or repealing a law by allowing the Secretary to act as a super-legislature, exercising omnibus authority to void ***any*** duly enacted law in any way applicable to building the border fence, free of any review of those determinations. That is the essence of a legislative act.

This Court's intervention to correct the lower court's erroneous decision is plainly warranted for several reasons. The constitutional issue presented here reaches to the heart of the principle of separation of powers that underlies our Nation's framework of democratic governance. The power to enact, amend, and repeal the laws is the quintessential legislative power vested exclusively in Congress by Article I. The authority granted to the Secretary by Section 102(c) effectively permits the Executive Branch to exercise that legislative authority, in defiance of this basic constitutional structure.

In addition, this Court's decision whether to grant review must take account of Section 102(c)'s virtually unprecedented elimination of any appeal as of right of petitioners' constitutional claims. If petitioners were in the same position as other litigants in the federal courts, and able to appeal as of right to the D.C. Circuit, that court would either invalidate the waiver authority or—by upholding the district court's ruling—create a conflict with the decisions of other courts of appeals that have struck down broad delegations without judicial review, a conflict that would warrant this Court's attention. Congress's elimination of any appeal as of right, either to the courts of appeals or to this Court, leaves discretionary review by this Court as the only means of obtaining a definitive resolution of this serious constitutional question.

Finally, the broad geographic reach of the fence project—stretching thousands of miles along the Nation's borders—is likely to produce a parade of decisions from different district courts. Because decisions by district court judges do not bind other district court judges, whether within or outside the same district, Congress's elimination of court of appeals' re-

view leaves only this Court with the ability to resolve the important constitutional issues raised by Section 102. Indeed, only this Court can resolve the conflict between the decision below and the courts of appeals that have addressed the issue presented here in different statutory contexts. These factors, along with substantial questions about the Secretary's compliance with the statutory "necessity" standard—prompted in part by the Secretary's failure to provide any justification whatever for most of the statutes waived here—combine to necessitate review by this Court.[4]

A. The Secretary's Expansive Authority To Waive Any Federal, State, Or Local Legal Requirement Violates The Constitution's Separation Of Powers.

Section 102's enormous delegation of power is unprecedented. Not only does the waiver authority extend to every federal, state, and local legal requirement, but the statute provides no right to a judicial determination that the Secretary's exercise of this authority complies with the standard established by

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[4] Construction has been substantially completed with respect to the portion of the fence challenged in this lawsuit, but petitioners' claims are not moot. A case becomes moot only where "a court * * * cannot grant 'any effectual relief whatever.'" *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). If petitioners prevail on their claim before this Court that the Secretary's action waiving NEPA and other laws was unconstitutional, petitioners can seek effective remedies under those laws to mitigate or avoid the harms threatened by the fence, including substitution of vehicle barriers in appropriate locations, such as streambeds, to allow wildlife passage and reduce serious hydrological damage during high rainfall events.

Congress. For that reason, this broad delegation of authority violates the principles recognized in the well-established nondelegation doctrine. The unchecked and unreviewable authority to waive any federal law in this case also violates the Constitution's clear command, recognized by this Court in *Clinton* v. *City of New York*, that Congress may not confer upon the Executive Branch the power to repeal duly-enacted statutes.

1. Conferring Broad Administrative Authority Without Judicial Review To Check Compliance With The Statutory Standard Constitutes An Unconstitutional Delegation Of Legislative Power.

This Court consistently has held that Congress may delegate broad power to the Executive Branch only if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

The intelligible principle standard is not a formalistic requirement necessitating only the inclusion in the statutory delegation of an acceptable incantation. What is essential to avoid an unconstitutional delegation is that the congressionally-specified limitation effectively constrain the Executive's use of the delegated authority.

Judicial review is the only effective means of ensuring that Congress's restrictions are obeyed. For that reason, this Court has expressly linked the intelligible principle standard and judicial review, stating that delegations may be upheld "so long as Con-

gress provides an administrative agency with standards guiding its actions ***such that a court could 'ascertain whether the will of Congress has been obeyed.'"*** *Skinner* v. *Mid-Am. Pipeline Co.*, 490 U.S. 212, 216 (1989) (emphasis added) (quoting *Mistretta* v. *United States*, 488 U.S. 361, 379 (1989)). This Court has never upheld a delegation of broad authority such as Section 102 that unequivocally precludes all judicial review to assess the Executive's compliance with Congress's constraining principle.

a. The "Intelligible Principle" Standard Requires Judicial Review To Ensure Agency Compliance With Congressional Delegations Of Authority.

The Court repeatedly has recognized the critical importance of judicial review in upholding broad grants of administrative authority against nondelegation challenges. In *Yakus* v. *United States*, 321 U.S. at 436, for example, the Court explained that Congress's standard for the Executive's exercise of the delegated authority must be sufficiently intelligible so that it is possible "in a proper proceeding to ascertain whether the will of Congress has been obeyed." The Court has adhered to that explanation in more recent decisions. See *Skinner*, 490 U.S. at 216; *Mistretta*, 488 U.S. at 379.

The Court's willingness to uphold delegations constrained by broad statutory principles is thus predicated on the availability of judicial review to give those principles concrete meaning:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular pol-

> icy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules * * *. ***Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.***

Am. Power & Light Co. v. *SEC*, 329 U.S. 90, 105 (1946) (emphasis added).

Touby v. *United States*, 500 U.S. 160 (1991), confirms this conclusion. There, a delegation of authority permitting the Attorney General to schedule a drug as a controlled substance temporarily was challenged on the ground that "the purpose of requiring an 'intelligible principle' is to permit judicial review," but the statute precluded judicial review of these temporary scheduling orders. *Id.* at 168. This Court did not dispute that judicial review is required; it found that the opportunity to challenge a temporary scheduling order in the context of a criminal prosecution was "sufficient to permit a court to ascertain whether the will of Congress has been obeyed." *Ibid.* (quotations omitted). See also *id.* at 170 (Marshall, J., concurring) ("judicial review perfects a delegated lawmaking scheme by assuring that the exercise of such power remains within statutory bounds").

The absence of judicial review, on the other hand, has been a factor in the Court's decisions striking down statutes on nondelegation grounds. In *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 533 (1935), the Court rejected a delegation of authority to the President to establish "codes of fair competition" regulating a trade or industry, noting in part that the new scheme lacked the safeguards of analogous Federal Trade Commission (FTC) deter-

minations, which included "judicial review [of FTC decisions] to give assurance that the action of the Commission is taken within its statutory authority." *Ibid.* *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), involved a provision of the National Recovery Act authorizing the President to ban interstate shipments of oil produced in violation of state law. The Court emphasized that an agency exercising delegated authority must both be constrained by a "necessary principle that * * * an agency * * * pursue the procedure and rules enjoined" and "show a substantial compliance therewith to give validity to its action." *Id.* at 432.

Lower courts also have consistently pointed to the importance of judicial review to upholding broad delegations of authority to agencies. *United States* v. *Pastor*, 557 F.2d 930, 941 (2d Cir. 1977) (rejecting nondelegation challenge because "[t]he procedures prescribed by Congress for regulation of the Attorney General's decision, coupled with the availability of judicial review [under the statutory scheme] * * * assure that the delegatee will not act capriciously or arbitrarily"); *United States* v. *Gordon*, 580 F.2d 827, 839 (5th Cir. 1978) (same); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers."). See also *South Dakota* v. *Dep't of Interior*, 69 F.3d 878, 881 (8th Cir. 1995) (invalidating provision on nondelegation grounds; court based its decision on the absence judicial review), *vacated*, 519 U.S. 919 (1996);[5] *Unit-*

[5] Following the court of appeals' decision, the Secretary of the Interior promulgated a regulation providing for judicial review of his administrative determinations, and the Solicitor General

ed States v. *Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994) (observing that "judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge" and rejecting nondelegation challenge due to availability of judicial review); *United States* v. *Widdowson*, 916 F.2d 587, 591 (10th Cir. 1990) (striking down, on nondelegation grounds, statute at issue in *Touby* because of lack of judicial review), *vacated*, 502 U.S. 801 (1991) (remanding for reconsideration in light of *Touby*'s holding that sufficient judicial review was available).[6]

This requirement of judicial review is especially important here in view of the Secretary's conclusion that Section 102 empowers him to waive not just federal law, but also "state, or other laws, regulations and legal requirements of, deriving from, or related to the subject" of nineteen specified federal statutes. 72 Fed. Reg. 60870 (Oct. 26, 2007). The scope of "an

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filed a certiorari petition stating that the court of appeals' decision rested in part on the lack of judicial review and urging this Court to grant review, vacate the lower court's decision, and remand the case to the Secretary for reconsideration in light of the new regulation. The Court did just that. *Dep't of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). The government's actions themselves confirm the importance of judicial review to the nondelegation inquiry.

[6] Although the Ninth Circuit in *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), rejected a nondelegation challenge to the Export Administration Act notwithstanding the statutory preclusion of review, the court rested its decision on its determination that "the Act * * * permit[s] courts to review * * * claims that the Secretary has acted completely outside the scope of his delegated powers" (*id.* at 1038)—thus recognizing that some judicial oversight of the Executive's exercise of delegated authority is necessary to satisfy the constitutional standard.

administrative agency's power to preempt state laws * * * affects the allocation of powers among sovereigns." *Watters* v. *Wachovia Bank*, 127 S. Ct. 1559, 1585 (2007) (Stevens, J., joined by Roberts, C.J., and Scalia, J., dissenting). Without judicial review, however, the Secretary will be free to preempt any state law he chooses, with no check to assure that his actions are consistent with Congress's delegation of authority.

b. Delegations Without Judicial Review Have Been Upheld Only In The Limited Circumstances In Which The "Intelligible Principle" Requirement Does Not Apply.

Congress need not prescribe an intelligible principle to guide administrative action with respect to narrow delegations that fall within the "certain degree of discretion, and thus of lawmaking, [that] inheres in most executive or judicial action." *Whitman*, 531 U.S. at 475 (2001). See also *ibid.* (stating that Congress "need not provide any direction" for extremely limited agency actions). Because judicial review is linked to the intelligible principle requirement, the Court has not required administrative actions of this type to be subject to judicial review.

Questions about the availability of judicial review of administrative action typically come before this Court as issues under the provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* That statute provides that judicial review is not available when review is precluded by statute (Section 701(a)(1)), or when "agency action is committed to agency discretion by law" (Section 701(a)(2)).

The Court has not found judicial review precluded by statute when the administrative action in ques-

tion was grounded in a broad delegation subject to the intelligible principle requirement. To the contrary, the Court has strained to find judicial review in those circumstances. See, *e.g.*, *Reno* v. *Catholic Social Services*, 509 U.S. 43 (1993) (construing the provision precluding review narrowly, and permitting judicial review of administrative decisions that did not involve individual applications for status adjustment).

The preclusion of review contemplated by Section 701(a)(2) involves situations in which there is "no law to apply" in assessing the permissibility of agency action. *Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971). That can occur only with respect to administrative actions that need ***not*** be constrained by a congressionally articulated "intelligible principle." See generally Viktoria Lovei, Comment, *Revealing the Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. Chi. L. Rev. 1047, 1065-67 (2006). Where an intelligible principle is not necessary, neither is judicial review.

For example, the Court has upheld discretionary action unconstrained by an "intelligible principle" and therefore appropriately exempt from judicial review under Section 701(a)(2) where the actions in question fall within the inherent authority of the Executive Branch. In holding an employment termination decision by the CIA Director unreviewable on statutory grounds, for example, the Court in *Webster* v. *Doe*, 486 U.S. 592, 601 (1988), emphasized the inherent discretion necessary to effectuate the mission of the CIA, noting that "the Agency's efficacy, and the Nation's security, depend in large measure on the reliability and trustworthiness of the Agency's

employees."[7] See also *Heckler* v. *Chaney*, 470 U.S. 821, 831-32, 837-38 (1985) (recognizing that Section 701(a)(2) preclusion is appropriate because the Executive's prosecutorial function is appropriately insulated from judicially enforceable legislative standards).

Section 102 does not resemble these narrow situations. Rather it involves an extremely broad delegation of authority that the government has recognized is subject to the "intelligible principle" standard. Reply Mem. in Supp. of Defs. Renewed Mot. To Dismiss 13-15 (Nov. 27, 2007). Because judicial review is an essential element of that standard, and that review is expressly precluded here, the waiver authority violates the nondelegation doctrine.

2. *Section 102's Stand-Alone, Omnibus Waiver Authority Violates Art. I, § 7 Of The Constitution.*

Section 102(c) resembles—and suffers from the same constitutional flaw as—the line item veto provision held unconstitutional in *Clinton* v. *City of New York*, 524 U.S. 417 (1998). Like the statute at issue in *Clinton*, therefore, it cannot stand.

The essential characteristic of the authority conferred on the President by the Line Item Veto Act, 2

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[7] The narrow authority of the CIA Director to terminate the employment of individuals working in intelligence cannot reasonably be equated with the authority of the DHS Secretary to unilaterally waive "all legal requirements" at the federal, state, or local level that he might deem, in his sole discretion, to be in some way related to the construction of the San Pedro fence. The former is the exercise of discretion inherent in executive action not subject to the intelligible principle requirement; the latter is exceedingly broad and is permissible only if Congress provides the requisite principle and associated judicial review.

U.S.C. § 691 *et seq.*, is that it gave the President "the power to 'cancel in whole' three types of provisions" that had been "signed into law"—budget authority, direct spending, and tax benefits. *Clinton*, 524 U.S. at 436. "With respect to both an item of new direct spending and a limited tax benefit, the cancellation prevent[ed] the item 'from having legal force or effect.'" *Id.* at 437. "In both legal and practical effect," the Court concluded, "the President['s cancellation of provisions in two statutes] has amended two Acts of Congress by repealing a portion of each." *Id.* at 438.

The Court found "important differences" between the process specified in the Constitution (Art. I, § 7) for the President's "return" of a bill to Congress and his exercise of the cancellation authority:

> The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

Clinton, 524 U.S. at 439. "What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the 'finely wrought' procedures that the Framers designed." *Id.* at 440. See also *INS* v. *Chadha*, 462 U.S. 919, 954 (1983) ("repeal of statutes, no less than enactment, must conform with Art. I").

Section 102 has all of the characteristics that the Court identified as objectionable in *Clinton*. It authorizes the Secretary to "cancel[]" any previously-enacted law and thereby deprive it of "legal force and effect" with respect to the construction of the border fence. *Clinton*, 524 U.S. at 437 (quotation marks omitted). The effect of those previously-enacted laws is thus "truncated" as a result of the Secretary's administrative action, not as a result of the procedure specified in the Constitution for the repeal of statutes by Congress. *Id.* at 440.

As in *Clinton*, Section 102 cannot be saved on the basis of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), in which the Court upheld the Tariff Act against a constitutional challenge. The Tariff Act authorized the president to suspend exemptions on export duties "for such time as he shall deem just" for any countries which impose upon products of United States duties which he "deem[s] to be reciprocally unequal and unjust." *Id.* at 689 (quotation marks omitted).

The Tariff Act provision was narrowly focused—permitting only the waiver of requirements imposed by the very statute in which the waiver provision was contained. Section 102, by contrast, is free-standing; confers extraordinarily broad authority to waive ***any*** federal, state, or local law or legal requirement; and exempts the Secretary's action from any judicial review other than for constitutional defect.

Section 102's free-standing nature; its unique omnibus applicability to any law or legal requirement that otherwise would govern the Executive

Branch's actions in constructing the fence,[8] and the absence of judicial review carry all of the essential characteristics of legislative action. Statutes enacted by Congress are reviewed only for constitutional defect; administrative action, however, typically is subject to judicial review for compliance with statutory standards. And Congress has plenary power to amend or repeal existing statutes—or to enact new measures—to address any subject within its broad constitutional authority; administrative waiver authority typically is focused on the requirements imposed by the particular statute granting the authority or similar statutes.

The district court below pointed to a number of waiver provisions, suggesting that because petitioners did not "question[] Congress's ability to confer the waiver power in these circumstances," the Section 102 waiver authority is similarly beyond question. App., *infra*, 10a. But none of the waiver provisions cited by the district court (*id.* at 10a n.5), are as un-

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[8] The authority to waive "any legal requirement," local, state, or federal, in its entirety, while precluding statutory judicial review, appears to be unprecedented. Memorandum from Stephen R. Viña & Todd Tatelman, Legislative Attorneys, Am. Law Division, Cong. Research Serv. on Section 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2-4 (Feb. 9, 2005); Blas Nuñez-Neto & Stephen Viña, *Border Security: Barriers Along the U.S. International Border* 8 (Cong. Research Serv. Dec. 12, 2006).

Other waiver provisions are cabined by (1) allowing waiver only of statutory requirements contained in the same statute that authorizes the waiver, (2) specifically enumerating the laws that may be waived, or (3) allowing waiver only of a grouping of similar laws. Nuñez-Neto & Viña, *supra*, at 8. See, *e.g.*, 10 U.S.C. § 1107(a); 22 U.S.C. § 2375(d); 29 U.S.C. § 793; 42 U.S.C. § 6212(b); 42 U.S.C. § 6393(a)(2); 50 U.S.C. § 2426(e).

constrained as Section 102—they are limited to a specific law or category of laws and none expressly precludes judicial review.[9] Like the waiver authority at issue in *Field*, they provide no basis for sustaining Section 102's broad grant of power.

The Secretary's modifications of existing laws are no less intrusive on the constitutional scheme than the line item vetoes at issue in *Clinton*. Unlike rulemaking or adjudicatory power, which authorizes agencies to create rules and standards in certain specialized fields, authorizing an Executive Branch official selectively to repeal *any* existing law that otherwise would constrain his action, without any judicial review to determine whether he has complied with the standard set by Congress, raises un-

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[9] The Intelligence Authorization Act of 1991, 10 U.S.C. § 433, for instance, explicitly confines the laws that can be waived to those "pertaining to the management and administration of Federal agencies" and the authority expired after four years. The Toxic Substances Control Act of 1976, 15 U.S.C. § 2621, confined its waiver authority to other provisions of the act itself and required congressional notification as well as a written record of the waiver's basis for in camera review in judicial proceedings. The Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(a)(3), simply permits the President to lift restrictions on aid to Iran, Libya, North Korea, and Sudan for national security or humanitarian reasons. Section 7117 of the No Child Left Behind Act of 2001, 20 U.S.C. § 7426(e), again confines the waiver authority to only a "regulation, policy, or procedure promulgated by that department [responsible for providing education and related services provided to Indian students]."

The waiver provision in the Trans-Alaskan Pipeline Authorization Act ("TAPAA"), 43 U.S.C. § 1652, is broad, but its exercise is expressly subject to judicial review for compliance with the standard specified by Congress. See *id.* § 1652(d).

precedented lawmaking concerns. See *The Federalist No. 47*, at 301 (James Madison) (C. Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands * * * may justly be pronounced the very definition of tyranny."). Because the sweeping waiver power conveyed by Section 102 permits the Secretary effectively to place himself above all existing law—and thus expands Executive authority beyond the bounds of Article II—*Clinton* requires the invalidation of Section 102.

B. The Questions Presented Are Both Legally Significant And Practically Important.

The extraordinary elimination of any appeal as of right with respect to the constitutional questions presented here means that the important issues raised by Section 102—issues on which courts of appeals have reached conclusions different from the court below—can be resolved only by this Court's intervention. Congress's decision to bypass the courts of appeals does not weigh against review by this Court; to the contrary, it is a factor strongly favoring a grant of certiorari here.

Moreover, the questions regarding the constitutionality of Section 102 presented here inevitably will recur as the Secretary issues new waivers, which then are challenged in various district courts in the seventeen States that may contain segments of the border fence. Because no district court's resolution of these issues will be binding on the next district court to consider them, a decision by this Court is the only way to prevent this duplicative litigation. Review by this Court is therefore plainly warranted.

1. Section 102(c)'s Virtually Unprecedented Restriction Of Appellate Review Necessitates This Court's Intervention.

Congress's approach to appellate review for cases involving Section 102(c), combined with the state of the law in the lower courts, warrants review by this Court to address the clear inconsistency between the decision below and the decisions of the courts of appeals.

As a threshold matter, the elimination of an appeal as of right—either to the courts of appeals or to this Court—sharply distinguishes this case from the norm in the federal system. Generally, when Congress bypasses the courts of appeals it provides for a direct appeal to this Court.[10] Here, however, it provided only for discretionary review on certiorari. As far as we have been able to determine, that approach is virtually unprecedented.[11]

Were this case reviewable by the D.C. Circuit, that court might well be expected to follow the reasoning of the other courts of appeals in finding seri-

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[10] See, *e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 901 & 922(a)(5)(b) (granting that decisions of the district court "shall be reviewable by appeal directly to the Supreme Court of the United States" and creating a "duty" for the district court and the Supreme Court "to advance on the docket and to expedite to the greatest possible extent the disposition" of any case challenging the constitutionality of the Act); Line Item Veto Act of 1996, 2 U.S.C. § 692(b) & (c) (same).

[11] The only other example we have located is the Trans-Alaskan Pipeline Authorization Act. See 43 U.S.C. § 1652. But the TAPAA—unlike Section 102(c) of IIRIRA—permitted the district court to adjudicate claims that the agency had exceeded its own statutory authority. See note 9, *supra*.

ous constitutional problems with a statute, like Section 102(c), that absolutely precludes review for compliance with Congress's mandate (see pages 15-16, *supra*). Alternatively, the D.C. Circuit might have affirmed the lower court, creating a conflict among the courts of appeals on this question that would warrant review by this Court.

The lack of any opportunity for appellate review, combined with the conflict between the result here and the approach taken by other courts and the importance of the legal issue, provides a strong justification for review by this Court. The opposite approach—denying review on the ground that there has been no decision by a court of appeals—would mean that Congress's decision to preclude an appeal as of right would effectively preclude review by this Court as well. The Court should reject that result and grant review.

2. *Review Is Necessary To Resolve Conclusively The Constitutionality Of The Section 102 Waiver Authority.*

Without review by this Court, relitigation of the serious, unsettled constitutional questions raised by Section 102 is likely to recur with each exercise of the Secretary's waiver authority. And given the length of the Nation's borders, that authority may well be exercised with considerable frequency.

The waiver authority applies generally to all barriers and roads "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." 8 U.S.C. § 1103 note. Thus, it potentially encompasses an area far in excess of the length of the southern border alone. Blas Nuñez-Neto & Stephen Viña, *Border Security: Fences Along the U.S. International Border* 1-2

(Cong. Research Serv. Jan. 11, 2006) (indicating that the "San Diego sector" comprises some 7000 square miles).

Indeed, Congress recently mandated construction of a barrier along at least 700 miles of the southwest border. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844. The project is already garnering significant attention, and expansion of the fence is expected. See, *e.g.*, Kevin Johnson, *In Southwest Fixing the Fence Never Ends*, USA Today, Sept. 16, 2007, at 1A.

The Secretary inevitably will issue additional waivers in connection with construction of these additional segments of the border fence. The waiver at issue here is not the only one issued thus far. See 72 Fed. Reg. 2535 (Jan. 19, 2007) (waiving federal, state, and other laws with respect to construction in the Barry M. Goldwater Range in Arizona). And *Sierra Club* v. *Ashcroft*, No. 04-0272, 2005 U.S. Dist. LEXIS 44244 (S.D. Cal. Dec. 12, 2005), involved a virtually identical constitutional challenge to waiver authority under a predecessor statute of Section 102(c).

While a district court decision resolves the particular controversy before the court, it lacks precedential effect. See, *e.g.*, *Gould* v. *Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (Posner, J.) ("[a] district court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis)"); *Fox* v. *Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) ("[a] district court is not bound by another district court's decision, or even an opinion by another judge of the same district court") (quotation marks omitted).

Continued litigation in district courts that apply varying standards fosters duplicative lawsuits and creates uncertainty. Congress did not restrict constitutional challenges to the waiver authority to the District Court for the District of Columbia, meaning that each district court in which a controversy arises—and the fence could run through a multitude of district courts in seventeen States—will have to resolve the legal issues anew. The preclusion of appellate review creates the potential for conflicting judicial determinations in each individual judicial district that shares a border with Canada or Mexico.

This repeated litigation is wasteful—of both judicial resources and the resources of the parties. This Court should intervene to resolve the issue.

3. Review Is Particularly Appropriate Here Because There Are Strong Indications That The Secretary's Waiver Exceeded His Statutory Authority.

The impact of the unconstitutional preclusion of judicial review is particularly egregious here because it is far from clear that the Secretary's waiver complies with the statutory standard.

The Secretary provided no explanation whatever for his decision. The order simply contains the conclusory assertion that he determined the waiver to be "necessary." 72 Fed. Reg. 60,870 (Oct. 26, 2007).

In particular, there is no explanation why it was "necessary" to waive statutes that had not been raised in this litigation—sixteen statutes ranging from the Clean Water Act and the Safe Drinking Water Act, to the Noise Control Act and the Farmland Protection Policy Act. See note 3, *supra*. It appears that the Secretary decided simply to exempt the fence construction from any statute that might con-

ceivably apply, with no consideration of whether the waiver of each particular statute was "necessary."

But Congress did not authorize the Secretary to exempt from otherwise applicable law his actions or the actions of other agencies simply because it was "convenient" or "expedient"; it required a determination of "necessity." The Secretary's blunderbuss approach gives little indication that the Secretary acted in accordance with that congressional standard; rather, it provides considerable evidence that he did not.

Even with respect to NEPA's Environmental Impact Statement ("EIS") requirement, the Secretary's conclusion here that a waiver was "necessary" is suspect in light of his decision one month earlier—in September 2007—to prepare an EIS for construction of the border fence in an area approximately ***ten times larger*** than that covered by the waiver here. Letter from Michael Chertoff, Secretary of Homeland Security, to Sen. Joseph Lieberman, Chairman of the Sen. Comm. on Homeland Security and Governmental Affairs, 5-6 (Feb. 14, 2008). If the Executive Branch could satisfy NEPA's requirements there, why was a waiver with respect to the SPRNCA fence segment "necessary"? Review by this Court is essential to make clear that the Constitution requires judicial review to ensure that broad delegations to the Executive Branch such as the waiver authority here are exercised in accordance with the statutory limits established by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2008

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, *et al.*,

Plaintiffs,

v.

MICHAEL CHERTOFF,
Secretary Of Homeland Security, *et al.*,

Defendants.

Civil Action No. 07-1801 (ESH)

MEMORANDUM OPINION

Plaintiffs Defenders of Wildlife and the Sierra Club initially brought this lawsuit to challenge defendants' compliance with several environmental statutes with respect to the construction of physical barriers and roads along the U.S.-Mexico Border within the San Pedro Riparian National Conservation Area ("SPRNCA") in Arizona. Plaintiffs have now amended their complaint to allege that the Secretary of Homeland Security's waiver of numerous federal environmental laws under Section 102 of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 306, 8 U.S.C. § 1103 note, is unconstitutional. Because the Court finds that the waiver does not offend the principles of separation of powers or the nondelegation doctrine, it rejects plaintiffs' constitutional attack, and it will grant defendants' motion to dismiss.

BACKGROUND

At the direction of Congress, the Department of Homeland Security ("DHS") has undertaken to construct "physical barriers and roads" at various points

along the United States' border with Mexico in order "to deter illegal crossings in areas of high illegal entry into the United States." 8 U.S.C. § 1103 note. On or about September 29, 2007, the Army Corps of Engineers, on behalf of DHS, began constructing border fencing, an accompanying road and drainage structures within the SPRNCA, an area which plaintiffs describe as "a unique and invaluable environmental resource" and "one of the most biologically diverse areas of the United States."[1] Pls.' Mem. in Sup. of Mot. for Temporary Restraining Order ["TRO Mot."] at 1, 4-5.

The SPRNCA is managed by the Bureau of Land Management ("BLM"), which issued a perpetual right of way to DHS for the area of the fence project. (*Id.* at 1; Defs.' TRO Opp'n at 1, 3.) Before granting the right of way, BLM completed an Environmental Assessment ("EA"), which concluded that the proposed fencing would have no significant impact on the environment when paired with certain mitigation measures, and that an Environmental Impact Statement ("IS") was therefore not required by the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.* (*See* Ex. A to Defs.' TRO Opp'n at 3-4.)

After initially attempting to pursue administrative remedies within the BLM (see Pls.' TRO Mot. at 2), plaintiffs filed this action on October 5, 2007, and simultaneously moved for emergency injunctive re-

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[1] The challenged fence construction required excavation on up to 225 of the SPRNCA's 58,000 acres, and the proposed fence segments will cover approximately 9,938 feet at the border when completed. (Defs.' Opp'n to Pls.' Mot. for Temporary Restraining Order ["TRO Opp'n"] at 3; Ex. A to Defs.' TRO Opp'n [BLM's EA and Finding of No Significant Impact] at 12).

lief to halt the construction of the fence within the SPRNCA. In support of their motion, plaintiffs argued that BLM's EA was inadequate and that NEPA required the preparation of a full IS. (*See id.* at 8-18.) They also argued that the BLM's grant of the right-of-way violated the Arizona-Idaho Conservation Act of 1988, which directs the BLM to manage the SPRNCA "in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area" and to "only allow such uses of the conservation area" that further the purposes for which it was established. 16 U.S.C. § 460xx-1. After conducting a hearing on October 10, 2007, the Court granted plaintiffs' motion for a Temporary Restraining Order ("TRO"), finding that plaintiffs had demonstrated a substantial likelihood of success on the merits with respect to their NEPA claims and that the balance of the equities favored plaintiffs. In response to the Court's order, defendants halted construction of the fence within the SPRNCA.

Approximately two weeks later on October 26, 2007, DHS Secretary Michael Chertoff published a notice in the Federal Register waiving NEPA, the Arizona-Idaho Conservation Act, and eighteen other laws with respect to the construction of the SPRNCA fence under the authority granted to him by section 102 of the REAL ID Act of 2005.[2] *See* 72 Fed. Reg. 60,870 (Oct. 26, 2007); 8 U.S.C. § 1103 note. Section 102 of the REAL ID Act gives the Secretary of Home-

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[2] Section 102 of the REAL ID Act amended section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009- 546, 3009-554, and both are codified at 8 U.S.C. § 1103 note.

land Security "the authority to waive all legal requirements" that he determines "necessary to ensure expeditious construction" of border fences and roads "to deter illegal crossings in areas of high illegal entry." 8 U.S.C. § 1103 note. This provision also limits judicial review of claims arising from the Secretary's exercise of the waiver authority, and it allows the district courts to consider only those claims that allege a violation of the Constitution.[3]

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[3] The REAL ID Act's waiver provision states:

(c) Waiver.—

(1) In general.— Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal court review.—

(A) In general.— The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.— Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) Ability to seek appellate review.— An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

In his Federal Register notice, the Secretary stated that the area within the SPRNCA covered by this Court's TRO was "an area of high illegal entry," that "[t]here [wa]s presently a need to construct fixed and mobile barriers" in the area, and that it was therefore "necessary" for him to exercise the REAL ID Act's waiver authority "[i]n order to ensure the expeditious construction of the barriers and roads that Congress prescribed . . . ."[4] 72 Fed. Reg. 60,870. Upon notification of the Secretary's waiver, the Court va-

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REAL ID Act § 102(c), 8 U.S.C. § 1103 note.

[4] In addition to NEPA and the Arizona-Idaho Conservation Act, the Secretary also waived the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*; the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Archeological Resources Protection Act, 16 U.S.C. § 470aa *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Noise Control Act, 42 U.S.C. § 4901 *et seq.*; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*; the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.*; the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; the Archaeological and Historic Preservation Act, 16 U.S.C. § 469 *et seq.*; the Antiquities Act, 16 U.S.C. § 431 *et seq*; the Historic Sites, Buildings, and Antiquities Act, 16 U.S.C. § 461 *et seq.*; the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 *et seq.*; the Farmland Protection Policy Act, 7 U.S.C. § 4201 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The Secretary waived all of these laws "in their entirety, with respect to the construction of roads and fixed and mobile barriers . . . in the area starting approximately 4.75 miles west of the Naco, Arizona Port of Entry to the western boundary of the SPRNCA and any and all land covered by the TRO." 72 Fed. Reg. 60,870.

cated the TRO. *Defenders of Wildlife* v. *Chertoff*, Civ. No. 07-1801, Minute Order (Oct. 26, 2007). Plaintiffs subsequently amended their complaint to allege that the waiver provision of the REAL ID Act violates the separation of powers principles embodied in Articles I and II of the Constitution because it "impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official." (Am. Compl. ¶¶ 36-38.)

In response, defendants have moved to dismiss plaintiffs' amended complaint under Rules 12(b)(1) and (6). Defendants argue, based on the Supreme Court's "nondelegation" line of cases, that the REAL ID Act's waiver provision is a constitutionally permissible delegation of legislative power to the Executive Branch because it provides the Secretary with an "intelligible principle" that "clearly delineate[s] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority" — i.e., that he may only waive the legal requirements that he "determines necessary to ensure expeditious construction of the barriers and roads." (Defs.' Renewed Mot. to Dismiss at 3-4 (quoting *Mistretta* v. *United States*, 488 U.S. 361, 372-73 (1989))), and 8 U.S.C. § 1103 note (internal quotation marks omitted)). In support of their argument, defendants also emphasize that "Congress may delegate in even broader terms" than otherwise permissible in matters of immigration policy, foreign affairs, and national security, because "the Executive Branch already maintains significant independent control" over these areas. (Defs.' Renewed Mot. to Dismiss at 4-5.)

ANALYSIS

The only issue presented is whether the Secretary's waiver under the REAL ID Act is constitutional. First and foremost, plaintiffs argue that the REAL ID Act's waiver provision is unconstitutional under *Clinton* v. *City of New York*, 524 U.S. 417 (1998), because it "provides the DHS Secretary with a roving commission to repeal, in his sole discretion, any law in all 50 titles of the United States Code that he concludes might impede construction of a border wall." (Pls.' Opp'n at 3-4 (emphasis omitted).) In *Clinton*, the Supreme Court struck down the Line Item Veto Act of 1996, which gave the President the authority to "cancel" certain federal spending items that had been passed by Congress, because the Court found that the Act — "[i]n both legal and practical effect" — allowed the President to amend Acts of Congress by repealing portions of them. *Clinton*, 524 U.S. at 438. Article I of the Constitution requires that all federal legislation pass both houses of Congress, and "before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. CONST. art. art. I, § 7. The cancellation procedures in the Line Item Veto Act, the Court held, were unconstitutional because "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton*, 524 U.S. at 438. "Amendment and repeal of statutes, no less than enactment, must conform with" the bicameralism and presentment requirements of Article I. *INS* v. *Chadha*, 462 U.S. 919, 954 (1983).

Plaintiffs argue that "[t]he power granted by section 102 of the REAL ID Act to the Secretary of DHS to 'waive' the applicability of any law that would otherwise apply to border wall and fence construction projects is unmistakably the power partially to repeal or amend such laws," and thus, that *Clinton* "squarely governs this case." (Pls.' Opp'n at 9-10.) The laws waived by the Secretary's federal register notice are "repeal[ed]," plaintiffs argue, "to the extent that they otherwise would have applied to wall and road construction" within the SPRNCA, and the waiver is therefore an "impermissible exercise of legislative authority." (Pls.' Surreply at 1, 2.)

Plaintiffs' arguments are unavailing, however, because the waiver provision of the REAL ID Act is not equivalent to the partial repeal or amendment at issue in *Clinton*. *See Sierra Club* v. *Ashcroft*, Civ. No. 04-272, 2005 U.S. Dist. LEXIS 44244, *21 (S.D. Cal. Dec. 12, 2005) (distinguishing the waiver of laws under the REAL ID Act from their "repeal"). It was "critical" to the *Clinton* Court's decision that the Line Item Veto Act essentially "g[a]ve[] the President the unilateral power to change the text of duly enacted statutes." *Clinton*, 524 U.S. at 446-47. The line items cancelled by the President would no longer have any "legal force or effect" under any circumstance. *Id.* at 437 (citing 2 U.S.C. §§ 691e(4)(B)-(C)). Similarly, in *Byrd* v. *Raines*, 956 F. Supp. 25, 37 (D.D.C. 1997) (vacated on other grounds), the predecessor case to *Clinton*, Judge Jackson of this Court reasoned that cancellation under the Line Item Veto Act "forever render[ed] a provision of federal law without legal force or effect, so the President who canceled an item and his successors must turn to Congress to reauthorize the foregone spending." *Id.* at 37. Judge Jackson also distinguished the Line Item Veto Act's

cancellation provision from the President's traditional authority to impound — or refrain from spending — funds appropriated by Congress, explaining: "Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly . . . ." *Id.* at 36. He therefore held that the cancellation provision violated the Presentment Clause and constituted "a radical transfer of the legislative power to repeal statutory law." *Id.* at 33, 35 ("The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.").

The REAL ID Act's waiver provision differs significantly from the Line Item Veto Act. The Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part. Each of the twenty laws waived by the Secretary on October 26, 2007, retains the same legal force and effect as it had when it was passed by both houses of Congress and presented to the President. The fact that the laws no longer apply to the extent they otherwise would have with respect to the construction of border barriers and roads within the SPRNCA does not, as plaintiffs argue, transform the waiver into an unconstitutional "partial repeal" of those laws. By that logic, *any* waiver, no matter how limited in scope, would violate Article I because it would allow the Executive Branch to unilaterally "repeal" or nullify the law with respect to the limited purpose delineated by the waiver legislation. Yet, as plaintiffs acknowledge, there are myriad examples of

waiver provisions in federal statutes,[5] and they have not questioned Congress's ability to confer the waiver power in these circumstances. (*See* Pls.' Surreply at 6.) If the REAL ID Act's waiver provision is unconstitutional under *Clinton*, numerous other statutory authorizations of executive waivers would also be invalid. Such a conclusion is certainly not supportable under *Clinton* or any other case cited by plaintiffs.

Nor can plaintiffs gain any solace by citing *Clinton's* discussion of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892), in which the Supreme Court upheld the constitutionality of a suspension provision in the Tariff Act of 1890. (*See* Pls.' Opp'n at 24.) The Tariff Act exempted certain import commodities from tariffs, but directed the President to "suspend" the exemption with respect to any country that he found imposed "reciprocally unequal and unreasonable" duties on American exports. *Field*, 143 U.S. at 680.

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[5] *See, e.g.*, 10 U.S.C. § 433 (Secretary of Defense, "in connection with a commercial activity," may waive compliance with "certain Federal laws or regulations pertaining to the management and administration of Federal agencies" if they would "create an unacceptable risk of compromise of an authorized intelligence activity."); 15 U.S.C. § 2621 (EPA may waive compliance with Toxic Substances Act "upon a request and determination by the President that the requested waiver is necessary in the interest of national defense."); 20 U.S.C. § 7426(e) (Secretaries of the Interior, Labor, Health and Human Services, and Education "[n]otwithstanding any other provision of law . . . shall have the authority to waive any regulation, policy, or procedure promulgated by [their] department" necessary for the integration of education and related services provided to Indian students.); 22 U.S.C. § 7207(a)(3) (President may waive a statutory prohibition on assistance to certain countries "to the degree [he] determines that it is in the national security interest of the United States to do so, or for humanitarian reasons.").

Clinton distinguished the Tariff Act from the Line Item Veto Act, identifying "three critical differences" between the two,[6] and plaintiffs argue that these differences demonstrate that the REAL ID Act's waiver provision must be invalidated under *Clinton*. *Clinton*, 524 U.S. at 443-44. (*See* Pls.' Opp'n at 25.)

However, in distinguishing *Field*, the *Clinton* Court did not purport to adopt a three-part test based on these distinctions to determine whether a particular waiver provision is constitutional. Rather, the deciding factor for the *Clinton* Court was that the cancellations under the Line Item Veto Act were the "functional equivalent of repeals of Acts of Congress," while the suspensions under the Tariff Act were "not exercises of legislative power." *Clinton*, 524 U.S. at 444. In particular, the Court noted that the Line Item Veto Act authorized the President "to effect the repeal of laws[] for his own policy reasons," thereby "rejecting the policy judgment made by Congress and relying on his own policy judgment." *Id* at 444, 45. By contrast, when the DHS Secretary exercises his waiver authority under the REAL ID Act, he is acting as Congress has expressly directed — *i.e.*, to "expeditious[ly]" construct "physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry . . . ." 8 U.S.C. § 1103 note. And more importantly, the *Clinton* Court distinguished the Tariff Act

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[6] Specifically, the Court found that in the Tariff Act, but not in the Line Item Veto Act, (1) "the exercise of the suspension power was contingent upon a condition that did not exist" when the statute was passed; (2) there was a duty to suspend or waive once a defined contingency had arisen; and (3) whenever the President suspended an exemption, he was executing the express congressional policy embodied in the statute. *Clinton*, 524 U.S. at 443-44

from the Line Item Veto Act on the ground that it related to "the foreign affairs arena," a realm in which the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Id.* at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)) (internal quotation marks omitted); *see also Field*, 143 U.S. at 691 ("[I]n the judgment of the legislative branch of government, it is often desirable, if not essential for the protection of the interests of our people . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.") The REAL ID Act's waiver provision, like the Tariff Act, relates to foreign affairs and immigration control — another area in which the Executive Branch has traditionally exercised a large degree of discretion. For these reasons, the *Clinton* Court's discussion of *Field* does not support plaintiffs' arguments.

In sum, the waiver provision at issue here is not equivalent to the power to amend or repeal duly enacted laws, and therefore the holding of *Clinton* is inapplicable. This conclusion finds additional support in Judge (now Chief Justice) Roberts' concurring opinion in *Acree* v. *Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004), where he was addressing the validity of a waiver provision contained in the Emergency Wartime Supplemental Appropriations Act ("EWSAA"). Section 1503 of the EWSAA authorizes the President to "make inapplicable to Iraq Section 620A of the Foreign Assistance Act of 1961 and '*any* other provision of law that applies to countries that have supported terrorism.'" *Id.* at 60 (Roberts, J., concurring) (emphasis added by Judge Roberts). Judge Roberts summarily dismissed in a footnote

plaintiffs' argument that "the grant of such authority to the President is unconstitutional in light of [*Clinton*] because such a grant would empower the President to . . . 'repeal [a statute] solely as it relates to Iraq.'" *Id.* at 64 n.3 (quoting appellees' brief). Rather, he found that "[t]he actions authorized by the EWSAA are a far cry from the line-item veto at issue in *Clinton*, and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign affairs." *Id*; *see also Jacobsen* v. *Oliver*, 451 F. Supp. 2d 181, 193 (D.D.C. 2006) (citing *Acree*, 370 F.3d at 64 n. 3).

Plaintiffs also argue more generally that the waiver authority violates fundamental separation of powers principles because it is an unconstitutional delegation of legislative power to the Executive Branch. "[T]he fundamental constitutional role of the Executive Branch under Article II," plaintiffs argue, "is to 'faithfully execute' — not selectively void — the laws. The Secretary's attempt to repeal unilaterally nineteen laws that otherwise would have constrained his conduct, and the law that purports to authorize him in taking such improper action, thus squarely offend both Article I and Article II." (Pls.' Opp'n at 2.) But "the Supreme Court has widely permitted the Congress to delegate its legislative authority to the other branches," so long as the delegation is accompanied by sufficient guidance. *Smith* v. *Fed. Reserve Bank of N.Y.*, 280 F. Supp. 2d 314, 324 (S.D.N.Y. 2003) (upholding EWSAA's waiver provision against a nondelegation challenge) (citing *Loving* v. *United States*, 517 U.S. 748, 771 (1996) ("Though in 1935 we struck down two delegations for lack of an intelligible principle, *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), we have

since upheld, without exception, delegations under standards phrased in sweeping terms."), and *Mistretta*, 488 U.S. at 373 ("After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards." (citations omitted))). A delegation of legislative power to the Executive Branch is permissible under Supreme Court precedent where Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform . . . ." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)) (second alteration in original) (internal quotation marks omitted).

In order to exercise the waiver authority under the REAL ID Act, Congress has required the Secretary to determine if the waiver is "necessary to ensure expeditious construction of the barriers and roads under [section 102 of IIRIRA]." 8 U.S.C. § 1103 note. Furthermore, he is directed to construct fencing only "in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." *Id.* This legislative directive meets the requirements of the Supreme Court's nondelegation cases. The "general policy" is "clearly delineated" — *i.e.* to expeditiously "install additional physical barriers and roads . . . to deter illegal crossings in areas of high illegal entry." *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note. And, the "boundaries" of the delegated authority are clearly defined by Congress's requirement that the Secretary may waive only those laws that he determines "necessary to ensure expeditious construction." *Mistretta*, 488 U.S. at 372-73; 8 U.S.C. § 1103 note.

The Supreme Court upheld a similar standard in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), its most recent opinion to address the nondelegation doctrine. The *Whitman* Court rejected a nondelegation challenge to a provision of the Clean Air Act that directed the Environmental Protection Agency to set air quality standards at a level "requisite to protect public health." *Id.* at 465 (citing 42 U.S.C. § 7409(b)(1)). The "scope of discretion" allowed by such a standard, which the Court interpreted to mean "not lower or higher than is necessary," was "well within the outer limits of [the Supreme Court's] nondelegation precedents." *Id.* at 474, 76 (noting that the Clean Air Act's standard was also "strikingly similar" to the standard approved in *Touby* v. *United States*, 500 U.S. 160, 163 (1991), which permitted the Attorney General to designate a drug as a controlled substance if doing so was "necessary to avoid an imminent hazard to the public safety."). The Court confirmed that its nondelegation precedent has never required Congress to define, for example, "how 'necessary' was necessary enough." *Id.* at 475.

Given this precedent, this Court cannot agree that the REAL ID Act's waiver provision constitutes an impermissibly standardless delegation. This conclusion is also in accord with the only other decision to address the question of whether the REAL ID Act's waiver provision is a constitutional delegation. In that case, the district court upheld the waiver provision, finding that "[a]pplying a standard of 'necessity' to Congress' delegation of authority passes constitutional muster."[7] *Sierra Club*, 2005 U.S. Dist.

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[7] As plaintiffs point out, the *Sierra Club* court mistakenly believed that the REAL ID Act's waiver provision applies only to the construction of a specific section of fencing near San Diego.

LEXIS 44244 at *21 ("The Court finds Congress provided an adequate standard [within the REAL ID Act] for the exercise of the DHS Secretary's delegated waiver authority over laws impeding the completion of the [border fence]: 'necessity,' *i.e.*, when needed 'to ensure expeditious construction of the barriers and roads under this section.'").

Finally, plaintiffs argue that while there are numerous examples in federal laws of provisions that allow the Executive Branch to waive various legal requirements in certain circumstances, "[t]he scope of the REAL ID Act's waiver provision . . . is unprecedented in our history." (Pls.' Opp'n at 3.) Plaintiffs rely on the fact that the REAL ID Act waiver permits the Secretary to waive any law with respect to the construction of the border fences and roads. (*See* Pls.' Opp'n at 22 ("The sweeping power to void existing law given to the Secretary by section 102 differs in fundamental ways from prior legally-valid Congressional waivers.").) Previous statutory waivers, plaintiffs contend, have often "involved Congress itself directly waiving particular laws, or instructing the President or another officer to waive particular provisions (usually provisions of the same law containing the waiver) if certain circumstances occur." (*Id.* at 3.) Plaintiffs also argue that many of the waiver provisions cited by the government permit the Executive Branch to waive only legal requirements contained within the same statute. (Pls.' Sur-

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See Sierra Club, 2005 U.S. Dist. LEXIS 44244, *21. But the court's reasoning was not dependent on the belief that the geographic scope of the waiver authority was so limited. Rather, the court upheld the waiver because the "necessity" standard provided an adequate intelligible principle to circumscribe the actions the Secretary was permitted to take. *Id.* at *20-21.

reply at 3.) Indeed, a memorandum produced by the Congressional Research Service notes that the REAL ID Act's waiver provision appears to be unprecedented in that it "contains 'notwithstanding language,' provides a secretary of an executive agency the authority to waive all laws such secretary determines necessary, and directs the secretary to waive such laws." (Pls.' Ex. 2 at 2-3). But even if, as argued by plaintiffs, this waiver provision is unique insofar as the number of laws that may be waived is theoretically unlimited, the Secretary may only exercise the waiver authority for the "narrow purpose" prescribed by Congress: "expeditious completion" of the border fences authorized by IIRIRA in areas of high illegal entry. *Sierra Club*, 2005 U.S. Dist. LEXIS 44244, at *20. Thus, the scope of the Secretary's discretion is expressly limited.

More importantly, despite the surface appeal of plaintiffs' arguments, they cannot survive careful scrutiny, for there is no legal authority or principled basis upon which a court may strike down an otherwise permissible delegation simply because of its broad scope. *See Loving*, 517 U.S. at 771 ("[W]e have since [1935] upheld, without exception, delegations under standards phrased in sweeping terms.") This lack of authority is hardly surprising, since to provide a constitutionally permissible "intelligible principle," Congress need only "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta*, 488 U.S. at 372-73 (quoting *Am. Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). Moreover, as cautioned by this Circuit, "[o]nly the most extravagant delegations of authority, those providing *no* standards to constrain administrative discretion, have been condemned by the Supreme Court as un-

constitutional." *Humphrey* v. *Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988) (emphasis added); *see also Yakus* v. *United States*, 321 U.S. 414, 426 (1944) ("Only if we could say that there is an *absence* of standards for the guidance of the Administrator's action . . . would we be justified in overriding [Congress's] choice of means for effecting its declared purpose . . . ." (emphasis added)); *Milk Indus. Found.* v. *Glickman*, 949 F. Supp. 882, 890 (D.D.C. 1996) (use of the nondelegation doctrine to overturn legislation should only be used in the "extremist instance") (quoting *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO* v. *Connally*, 337 F. Supp. at 737, 762 (D.D.C. 1971)).

Applying these precedents, the Court concludes that it lacks the power to invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power. Rather, under the nondelegation doctrine, the relevant inquiry is whether the Legislative Branch has laid down an intelligible principle to guide the Executive Branch, not the scope of the waiver power. Therefore, based on controlling Supreme Court precedent, the Court finds that the REAL ID Act's waiver provision is a valid delegation of authority.

This conclusion is further buttressed by the well-established principle that was decisive in the *Clinton* case, 524 U.S. at 445 — "[w]hen the area to which the legislation pertains is one where the Executive Branch already has significant independent constitutional authority, delegations may be broader than in other contexts." *Sierra Club*, 2005 U.S. Dist. LEXIS 44244 at *17 (citing *Loving*, 517 U.S. at 772). The construction of the border fence pertains to both foreign affairs and immigration control — areas over

which the Executive Branch traditionally exercises independent constitutional authority. Thus, with respect to border control measures such as those at issue here, the Executive has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *Clinton*, 524 U.S. at 445 (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 320) (internal quotation marks omitted). When Congress legislates regarding foreign affairs or immigration control, "it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Because these powers are "also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise [them]. . . ." *Id.* at 543.

In sum, given the Supreme Court's ready acceptance of the "necessity" standard as an adequate "intelligible principle" to guide a delegation of legislative authority to the Executive Branch, as well as the Executive's independent constitutional authority in the areas of foreign affairs and immigration control, the Court is constrained to reject plaintiffs' claim that the waiver provision of the REAL ID Act is an unconstitutional delegation.

CONCLUSION

Because the Court holds that the Secretary's waiver is constitutional, and because it has no jurisdiction to decide plaintiffs' statutory claims, defendants' renewed motion to dismiss [Dkt. # 17] is **GRANTED**, and the case is dismissed with prejudice. A separate order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: December 18, 2007